



**Office of the Attorney General
State of Texas**

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ATTORNEY GENERAL

August 30, 1995

Honorable Fred Hill
Chair
House Committee on Urban Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 95-055

Re: Whether particular telephone conversations between members of a city council contravene the Open Meetings Act, chapter 551, Government Code, and related questions (RQ-755)

Dear Representative Hill:

You state that a city posits three questions about the implications of the Texas Open Meetings Act (the "act"), Gov't Code ch. 551, for telephone conversations about city business made by one city council member to another. The act is intended to safeguard the public's interest in knowing the workings of its governmental bodies, *Cox Enter. Inc. v. Board of Trustees*, 706 S.W.2d 956 (Tex. 1986), and we address these questions in light of this purpose. The first question is as follows:

Whether a member of the city council may telephone individually a quorum of the members of the council in order to express his views and/or concerns about public business which has not been formerly considered by the council in an open session without violating the act?

Pursuant to the act, every meeting of a governmental body shall be open to the public, except as provided by the act itself. Gov't Code § 551.002. A "meeting" is defined as

a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and other person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action.

Id. § 551.001(4). "Deliberation" is defined in part as

a verbal exchange during a meeting between a quorum of a governmental body . . . concerning an issue within the jurisdiction of the governmental body or any public business.

Id. § 551.001(2). Members of a governmental body are prohibited from conspiring to meet in numbers less than a quorum for the purpose of secret deliberations. *Id.* § 551.143(a).

You inform us that a council member insists that "unity of time and place" is necessary for the conduct described by the first question to constitute a violation of the act. He argues that, otherwise, a council member would have to keep track of every single conversation with each council member to decide whether he could engage in another conversation with a council member.

A court has already determined that members of a governmental body may violate the act even though they are not physically present in one place. In *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App.—San Antonio 1985, no writ), the court upheld an injunction restraining school trustees from engaging in deliberations to discuss public business or public policy by means of telephone conferences.¹ We discussed *Mabry* in Attorney General Opinion DM-95, stating as follows:

With respect to polling the members of the governmental body individually, the dissent appears to take the view that the simultaneous physical presence of a quorum in one place is necessary for a violation of the act's requirement that meetings be open to the public. Though the majority opinion does not expressly discuss this point, it is clear that it takes the opposite view, i.e., a view consistent with the district court's finding that the practice constitutes a violation of sections 2 and 3A [now section 551.002 and subchapter C] of the act. This view is the basis for the district court's issuance of the injunction, which the majority opinion upheld.

Attorney General Opinion DM-95 (1992) at 5. Our opinion further states:

Though polling members of a governmental body by telephone was specifically at issue in *Mabry*, it seems immaterial to the application of the law whether such polling was done by telephone or otherwise. Following *Mabry*, it appears that the physical presence of a quorum in a single place at the same time is not always necessary for a violation of sections 2 and 3A to occur. Avoiding the technical definition of "meeting" or "deliberation" is not, therefore, a foolproof insulator from the effect of the act. Indeed, it would appear that the legislature intended expressly to reach deliberate evasions of these

¹The Seventy-fourth Legislature amended the act to authorize a governmental body to hold a meeting by telephone conference call only if (1) there is an emergency or urgent public necessity and (2) it is difficult or impossible to convene a quorum at one location. Act of May 29, 1995, 74th Leg., R.S., ch. 1046, § 1, 5193, 5193 (to be codified at Gov't Code § 551.125).

definitions in enacting section 4(b) [now Gov't Code § 551.143(a)] of the act.

Id.

In response to the first question, we cannot advise you that a member of the city council may telephone individually a quorum of the members of the council to express his views and/or concerns about public business without violating the act.² Whether any specific behavior or pattern of behavior constitutes a violation of the act must ultimately be determined by a trier of fact.

The second question is as follows:

Whether the whole series of telephone calls hypothetically posed [in the first question] above violates the act if all, except one, of the quorum of council members contacted remain silent while listening to the council member's views, and the one council member who responds merely asks "why" in response to something that the council member who initiated the call expounds?

You inform us that the city advised its council that no deliberations have occurred under the circumstances described above, based on the view that merely uttering "why" is not a substantive or material verbal exchange. The city apparently assumes that discussion of the topic begins and ends with the described series of phone calls, but, in fact, council members who merely listen during the call might respond later in person or by return call.

The city also assumes that no deliberations take place when a single member of a governmental body addresses a quorum of members. In *Dallas Morning News Co. v. Board of Trustees*, 861 S.W.2d 532, 537 (Tex. App.--Dallas 1993, writ denied), the court stated that a "verbal exchange" is a "reciprocal giving and receiving of spoken words," and it held that the act did not apply when school board members listened silently to a report by Texas Education Agency employees. The *Dallas Morning News* court did not consider a case where one member of a governmental body addressed a quorum of the body, nor are we aware of any case that has addressed such facts. We cannot conclude that the act does not apply to a quorum of a governmental body during a time when a single member of the body addresses the others. Whether deliberations have taken place depends upon all the relevant facts and circumstances, and it is a question for the trier of fact. Accordingly, we cannot advise you that members of the city council may participate in the described telephone conversations without violating the act.

²Even if the amendment to the act authorizing telephone meetings had been in effect when the city council members spoke by telephone, it would not have permitted their telephone conversations as described to us. Act of May 29, 1995, 74th Leg., R.S., ch. 1046, § 1, 5193, 5193.

fact. Accordingly, we cannot advise you that members of the city council may participate in the described telephone conversations without violating the act.

You finally ask the following question:

Whether a violation of the act [will] be cured if the same deliberation which occurred in a closed session is revisited in an open meeting or if the telephone conversations were taped and replayed in the open meeting?

A governmental body that has voted or attempted to take formal action without complying with the act may meet again and validate the action at a properly convened meeting of which the public has received adequate notice. *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 646-47 (Tex. 1975). The action will be valid only from the date of the meeting that complies with the Open Meetings Act. *Id.*; see *Ferris v. Texas Bd. of Chiropractic Examiners*, 808 S.W.2d 514 (Tex. App.—Austin 1991, writ denied). We do not know of any procedure for curing violations caused by deliberations that did not comply with the act. Such violations may subject the participants to criminal penalties under the act. See Gov't Code §§ 551.143 - 145. Accordingly, we do not believe that such violations may be cured by repeating the deliberations in an open meeting held in compliance with the act.

S U M M A R Y

It is possible for members of a governmental body to violate the Open Meetings Act even though they are not physically present in one place, for example, by discussing public business of the governmental body over the telephone. Whether members of a governmental body have engaged in deliberations that violate the act is a fact question. A governmental body may validate a vote or formal action taken without complying with the act, but we know of no procedure for validating deliberations that did not comply with the act. Such violations may subject the participants to criminal penalties under the act.

Yours very truly,



Susan L. Garrison
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Opinion Committee